

ALTERNATE STAFF DRAFT #5 (6.20.08)

June XX, 2008

DRAFT UNOFFICIAL ADVISORY OPINION 08-XX

Interpretation Tenn. Code Ann. §§ 3-6-305 with regard to whether any of the exceptions contained therein allow state officials subject to the Tennessee Ethics Reform Act to solicit contributions from employers of lobbyists on behalf of a state employee's organization.

Initial Requestor¹: Gerry Boaz, Immediate Past President and Chapter Executive Committee member, Association of Government Accountants.

QUESTION

If it is assumed the Tennessee Ethics Reform Act ("Act") gift ban² prohibits officials in the executive branch and officials in the legislative branch ("State Officials") from soliciting employers of lobbyists ("Employers") for contributions to the Association of Government Accountants ("AGA"), do any of the statutory exceptions to the general gift ban³ allow for this conduct?

ANSWER

Yes. Assuming but not deciding⁴ that the behavior is prohibited by the Act's gift ban,⁵ Tenn. Code Ann. §§ 3-6-305(b)(1) and 3-6-305(b)(7)(B) provide exceptions which would allow officials to solicit employers. Under subsection (b)(1), state officials are not prohibited from soliciting employers for benefits customarily provided through an outside activity of the official,

¹ Mr. Boaz posited the question addressed in this opinion as part of a formal request for an Advisory Opinion which contained several questions. This opinion answers only the very narrow question below, and does so by making an assumption that the Act's gift ban generally applies to the conduct in question. Mr. Boaz did not make such an assumption.

² Tenn. Code Ann. § 3-6-305(a).

³ Tenn. Code Ann. § 3-6-305(b).

⁴ The commission has not decided the question whether the general gift ban prohibits a state official, acting in his capacity as a board member of the AGA, from soliciting contributions for the AGA from an employer.

⁵ Tenn. Code Ann. § 3-6-305(a).

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as long as the benefits are not enhanced due to the official's status. Under subsection (b)(7)(B), State Officials are not prohibited from soliciting Employers for contributions for the specific and limited purpose of paying for entertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets to be provided in connection with, and arranged or coordinated through the designated agents of, a conference sponsored by the AGA.

FACTS

The AGA is a national professional organization promoting government accountability, providing education, fostering professional development and providing certification. The AGA also supports standards and research to advance government accountability. The AGA's membership is comprised of government accountability professionals such as auditors, accountants, budget analysts, chief financial officers, information systems managers, finance directors, inspectors general, professors and students. Chapter Executive Committee members receive permission from their respective agencies to serve as such.

Most AGA chapters have fundraising activities. In 2006, AGA solicited funds from private businesses to sponsor the Southeastern Professional Development Conference, a regional event. The AGA plans to hold a conference in 2008. The AGA intends to solicit funds from businesses having previously sold goods and services to the State of Tennessee. The AGA wants to start a Corporate Sponsorship Committee to solicit contributions from local businesses to benefit all members of the AGA.

ANALYSIS

Solicitation is Excepted in Some Cases

Tenn. Code Ann. § 3-6-305(a)(1) prohibits gifts from Employers to State Officials.⁶ Tenn. Code Ann. § 3-6-305(a)(2) provides State Officials may not *solicit* or accept gifts from Employers.⁷ These two provisions are, together, called the gift ban. If one assumes the gift ban found in Tenn. Code Ann. § 3-6-205(a) does prohibit State Officials from *soliciting*⁸ contributions from Employers, there is still a separate question whether any of the exceptions to the gift ban might apply.

Subsection 3-6-305 (b) lists twelve (12) exceptions to the gift ban. The exceptions deal with informational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication,⁹ unsolicited tokens or awards of appreciation, honorary degrees, or bona fide awards in recognition of public service in the form of a plaque, trophy, desk item, wall memento and similar items (provided that any such item is

⁶ Tenn. Code Ann. § 3-6-205(a)(1).

⁷ Tenn. Code Ann. § 3-6-205(a)(2)(emphasis added).

⁸ (emphasis added).

⁹ Tenn. Code Ann. § 3-6-305(b)(2).

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not readily convertible to cash),¹⁰ opportunities and benefits made available to all members of an appropriate class of the general public, various benefits provided in connection with conferences or specified types of in-state events, occasional or incidental local travel, and contributions to a fund established and controlled by a 501(c)(3) corporation for the benefit of an extremely ill immediate family member of an official in the executive branch.¹¹ Only three of these exceptions would appear, at first glance, to have any possible bearing on the facts presented by the request.

Tenn. Code Ann. § 3-6-305(b)(1) does apply

Tenn. Code Ann. § 3-6-305(b)(1) provides an exception for “[b]enefits resulting from business, employment, or other outside activities of a candidate or official or the immediate family of a candidate or official, if such benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official.” Participation in the AGA is an “outside activity” of some state officials.

Thus it appears the exception would apply to benefits customarily provided to AGA by an employer. In order to determine the complete effect of this exception, however, it is necessary to look at the first words of subsection (b), as follows: “The following are not subject to the prohibition in subsection (a).” The prohibition in subsection (a) is against officials soliciting or accepting gifts from employers, and against employers providing gifts to officials. Thus the effect of the (b)(1) exception is not to exclude benefits from outside activities from the definition of “gift.” Rather, the effect is to exclude such benefits from subsection (a)’s prohibitions against soliciting, accepting, and giving gifts. The exclusion applies so long as the items are of the sort defined in the statute, and are solicited, accepted, and provided in a manner consistent with the statutory requirements.

The customary benefits to which this exception applies would appear to include: qualification for the certification as a Government Financial Manager,¹² continuing education programs,¹³ receipt of several publications,¹⁴ and participation in educational seminars and conferences.¹⁵ So long as the official solicits only for benefits which are customarily provided to the members, and those benefits are not enhanced due to the status of the official, the solicitation of an employer by the official is “not subject to the prohibition of subsection (a).”

Tenn. Code Ann. § 3-6-305(b)(6) does not apply.

¹⁰ Tenn. Code Ann. § 3-6-305(b)(5).

¹¹ Tenn. Code Ann. § 3-6-305(b)(12).

¹² This certification is recognized by seven (7) states, including Tennessee. <http://www.agacgfm.org/cgfm/whyearn/> (last viewed June 19, 2008).

¹³ <http://www.agacgfm.org/education/educationdefault.aspx> (last viewed June 19, 2008).

¹⁴ These publications include the Journal of Government Financial Management, which address topics relevant to government accounting. <http://www.agacgfm.org/publications/PublicationDefault.aspx> (last viewed June 19, 2008).

¹⁵ As noted below, the AGA offers at least five (5) periodic conferences which address various aspects of the government accounting field.

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Tenn. Code Ann. § 3-6-305(b)(6) provides an exception to the gift ban for “[o]pportunities and benefits made available to all members of an appropriate class of the general public.”¹⁶ AGA membership is not “available to all members of an appropriate class of the general public.”¹⁷ Unlike many membership organizations, AGA membership is only open to state government employees and thus mainly to State Officials. There is no reason to read the Act to allow State Officials to comprise, “an appropriate class of the general public.” Such a reading would serve to undermine and invalidate the Act as it would allow Employers to directly give gifts to State Officials as an appropriate class of the general public. Courts must construe statutes “with the saving grace of common sense.”¹⁸ The Commission must do the same.

Tenn. Code Ann. § 3-6-305(b)(7)(B) does apply

Tenn. Code Ann. § 3-6-305(b)(7)(B) provides that the general gift ban is not applicable to certain items provided in connection with a conference sponsored by an established and recognized organization. Specifically, the subsection provides:

Entertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets that are provided in connection with, and are arranged or coordinated through the employees or designated agents of, a conference, if the conference is sponsored by an established and recognized organization of elected or appointed state government officials, staff of state government officials or both officials and staff, or any other established and recognized organization that is an umbrella organization for such officials, staff, or both officials and staff;¹⁹

The scenario posed by the requestor fits the requirements of this exception. The AGA is an established and recognized umbrella organization for State Officials. The AGA was established September, 1950.²⁰ It offers at least five (5) conferences which address various aspects of the government accounting field.²¹ As noted above, the AGA also offers its members

¹⁶ Tenn. Code Ann. § 3-6-305(b)(6) then goes on to enumerate several non-exclusive examples of situations in which opportunities and benefits are made available to all members of an appropriate class of the general public. Those specific examples include, items such as prizes and awards for public contests, and benefits of participation in events held within the state and sponsored by, or for the benefit of, charitable organizations. In other words, all members of the public must be eligible to participate and receive the opportunities and benefits.

¹⁷ Tenn. Code Ann. § 3-6-305(b)(1) provides an exception for benefits, “customarily provided to others in similar circumstances” and would thus allow benefits to persons who were not “an appropriate class of the general public” as required by Tenn. Code Ann. § 3-6-305(b)(6).

¹⁸ *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)(citations omitted)(discussing that a court must presume the legislature intended a statute to be constitutional).

¹⁹ Tenn. Code Ann. § 3-6-305(b)(7)(B).

²⁰ <http://www.agacgfm.org/about/history.aspx> (last viewed June 19, 2008).

²¹ <http://www.agacgfm.org/conferences/> (last viewed June 19, 2008).

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many types of continuing education and publications relevant to government accounting.²² Thus AGA would meet the sponsorship requirement of Tenn. Code Ann. § 3-6-305(b)(7)(B).

To meet the other requirements of Tenn. Code Ann. § 3-6-305(b)(7)(B), the gifts must be coordinated or arranged through employees or agents of the conference. The context of the section also makes clear that it does not allow the State Official to solicit funds to be used for his own direct benefit. In addition, as stated in the exception, the solicitation must be to provide “[e]ntertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets that are provided in connection with, and are arranged or coordinated through the employees or designated agents of, a conference.” The exception would not cover officials soliciting employers for other benefits or for other purposes.

This interpretation of the exception allowing State Officials to solicit Employers to fund a conference sponsored by an established and recognized conference of State Officials fits with the other exceptions found within subsection (b) of Tenn. Code Ann. § 3-6-305. When considered *in pari materia* with the other exceptions provided for in Tenn. Code Ann. § 3-6-305, this reading of subsection (b)(7)(B) is justified.²³ Tenn. Code Ann. § 3-6-305(b)’s subsections provide exceptions to the general gift ban. In each subsection, the exceptions are narrow, focused, and require that where the State Official may take gifts otherwise prohibited, he can only do so if he is treated no differently than a non-State official receiving the gift.²⁴

Finally, this narrow exception is line with the expressly stated purpose of the Act. Tenn. Code Ann. § 3-6-102 states the Act’s purpose as follows:

It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee Ethics Commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

By its express language setting forth specific requirements, Tenn. Code Ann. § 3-6-305(b)(7)(B) provides a regulated and transparent purpose for which State Officials may solicit Employers.²⁵

²² <http://www.agacgfm.org/publications/PublicationDefault.aspx> (last viewed June 19, 2008).

²³ Statutes *in pari materia*, in other words, statutes “relating to the same subject or having a common purpose,” should be construed together, and the construction of one may be used to help resolve ambiguity in another. *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn.1994).

²⁴ Tenn. Code Ann. § 3-6-305(b)(1) through (12).

²⁵ Allowing State Officials to solicit employers for a conference of an established and recognized organization of State Officials, or an umbrella organization for such State Officials would also be in line with Tenn. Code Ann. § 3-6-301(11). In Tenn. Code Ann. § 3-6-301(11) the Act excepts from the definition of “gift” “the waiver of a registration fee for a conference or educational seminar.” While an Employer waiving a State Official’s registration

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fee is factually distinct from a State Official soliciting an Employer to fund a conference of an established and recognized organization of State Employees, considering the two sections in pari materia, it does seem the Act wishes to encourage State Officials to attend educational conferences and seminars.